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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-406

GEORGE DENTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This reply brief is respectfully submitted on behalf of petitioner George Denti, in response to the Government's "Memorandum in Opposition" to the petition for a writ of certiorari.

The Government contends* that the petitioner's contention regarding his right to dismissal of the indictment

* The Government's contentions with respect to the arguments advanced in petitioner Denti's original brief are set forth both in its "Memorandum in Opposition" to Denti's petition and its "Brief in Opposition" to the companion petition of Denti's co-defendants, Michael Paterno and Paterno and Sons, Inc.

because of the Government's deliberate decision to unlawfully deprive him of his right to an administrative conference should be rejected because, in the Government's view, (1) an amendment to the Internal Revenue Service regulation upon which petitioner relies was allegedly enacted prior to submission of petitioner's case to Regional Counsel, and (2) the deprivation by the Internal Revenue Service of petitioner's right to an administrative conference should not affect or curtail the grand jury's "plenary power" to indict. For the following reasons, it is respectfully submitted that the Government's contentions should be rejected, and that the petition for a writ of certiorari should be granted.

(1) The Amendment Of The Applicable Regulation

The Government states* that petitioner's right to a conference in Intelligence prior to referral of the case to Regional Counsel, as set forth in Section 601.107(b)(2) of the Internal Revenue Practice General Procedure and Rules, "was deleted from the Statement of Procedural Rules effective December 14, 1972, before submission of petitioners' cases to Regional Counsel. See 38 Fed. Reg. 9227." This contention by the Government is simply inaccurate. The effective date of the amendment to the Rules upon which the Government relies was not until April 12, 1973; petitioner respectfully refers the Court to the Federal Register citation upon which the Government relies, which contains no reference whatever to the date which the Government claims was the effective date of the amendment but, rather, establishes the effective

* In its brief in opposition to the Paterno petition, at pages 7-8 thereof.

date as being April 12, 1973, which was subsequent to the referral of petitioner's case to Regional Counsel.

Although the Government's opposing brief in this Court does not suggest any basis for the earlier date claimed by the Government, petitioner assumes that the Government's contention is based upon the same contention which the Government made in its brief in the United States Court of Appeals for the Second Circuit. There, the Government argued that a wholly internal and unpublished memorandum from the Assistant Commissioner (Compliance) and Chief Counsel to all Regional Commissioners and all Regional Counsel, which purported to revoke a taxpayer's right to an administrative conference as provided in the published regulation of the Internal Revenue Service then existing, and to replace it with the revised limited right as later contained in the amended regulation effective April 12, 1973, was dated December 14, 1972. However, even in the memorandum as described by the Government in its appellate brief,* the memorandum dated December 14, 1972 was a mere internal memorandum circulated only within the Internal Revenue Service. It is well-settled law that a wholly internal memorandum such as that relied upon by the Government "was simply a housekeeping provision of the Department" which "was never promulgated as a regulation of the Department and published in the Federal Register," *Sullivan* v. *United States,* 348 U.S. 170, 173 (1954); as such it was of no legal effect and cannot be deemed to have abrogated petitioner's right to a conference as guaranteed by a published Internal Revenue Service regulation. This is further buttressed by the fact that when the published regulation was amended the effective

* This memorandum was reproduced in the Government's appellate brief but was without any evidentiary support in the record.

date of the amendment, as printed in the published amendment, was April 12, 1973, rather than the date of the alleged internal I.R.S. memorandum.

Moreover, it is respectfully submitted that even if the amended regulation had been in effect prior to the referral of the case against petitioner to Regional Counsel, the Government's actions in denying petitioner his right to a conference would have required dismissal of the indictment. Even under the regulation as amended, petitioner would have had an absolute right to an administrative conference by merely requesting one. Yet the Government conceded during oral argument in the Court of Appeals that a decision had been unilaterally made by the Internal Revenue Service not to grant petitioner a conference even if one had been requested. Thus, a request for such a conference would have been a useless and therefore unnecessary act, by the Government's own admission.

(2) The Grand Jury's Powers

The Government claims that even if the Internal Revenue Service violated petitioner's right to an administrative conference, that violation should not affect the grand jury's "plenary power" to indict. This contention by the Government is anticipated in petitioner's original brief at pages 19-21 thereof, and the arguments set forth thereon will not be repeated here. However, it is significant that the Government's brief fails to address this Court's recent holding in *United States* v. *Nixon*, —— U.S. ——, 94 S. Ct. 3090, 3100 (1974), that it is the Executive Branch of the Government which has exclusive authority regarding the decision to prosecute, and the holding in *United States* v. *Cox*, 342 F.2d 167 (5th Cir. 1965), cert. denied 381 U.S.

935, cited with approval by this Court in *United States* v. *Nixon,* that the grand jury is without power to indict absent the consent and signature of the United States Attorney. Instead, the Government relies upon three cases, none of which, it is respectfully submitted, supports its position.

In *Sullivan* v. *United States,* discussed *supra,* upon which the Government relies, this Court held that the Government's violation of provisions contained in a memorandum circulated exclusively within a government agency, and never published in the Federal Register, could not vitiate an indictment. In the instant case, however, petitioner's right to an administrative conference was expressly granted in a published regulation printed in the Federal Register. In *Lawn* v. *United States,* 355 U.S. 339 (1958), upon which the Government also relies, this Court held that where a grand jury returns an indictment valid on its face, and where a motion for dismissal of the indictment is based upon no evidence beyond the defendants' mere suspicion that illegally obtained evidence was presented to the grand jury, the defendants are not "entitled to a preliminary hearing to enable them to satisfy their unsupported suspicions". (355 U.S. at 350) That holding clearly does not affect the instant case, where (1) the motion to dismiss is not based upon suspicion but upon the undisputed fact that petitioner was deprived of his right to a pre-indictment administrative conference, and (2) the issue in question is not merely the nature of the evidence presented to the grand jury, but the proper limitation on the grand jury's power to return an indictment, signed by the United States Attorney, when a defendant is unjustifiably and unlawfully deprived of his right to a pre-indictment administrative conference. Similarly, in *United States* v. *Calandra,* 414 U.S. 338 (1974), upon which the Government also re-

lies, this Court held that a witness who has been properly subpoenaed to testify before a grand jury may not refuse to answer the grand jury's questions simply because those questions are based upon evidence unlawfully seized from the witness; nothing in *Calandra* suggests that a grand jury may itself be used as an instrument to deprive a defendant of a right granted to him by a published regulation of an administrative agency. In declining to extend the exclusionary rule to grand jury proceedings, this Court in *Calandra* held that to do so "would unduly interfere with the effective and expeditious discharge of the grand jury's duties" (94 S. Ct. at 621). No such rationale applies to the instant case: the grand jury's effectiveness would in no way be affected by requiring the Executive Branch of the Government to obey its published regulations. Moreover, in those cases where speedy indictment is of the essence for any reason, the published regulation in question specifically provided for an exception to a taxpayer's right to an administrative conference where "compelling reasons exist" (see Section 601.107(b)(2) of the Internal Revenue Practice General Procedure Rules (1968)). Yet the Government has at no time suggested the existence of any such "compelling reasons"—or any reason whatsoever—for its unilateral decision to unlawfully deprive petitioner of his right to an administrative conference.

Finally, the Government argues that the decision of the Court below does not conflict with decisions rendered with Courts of Appeals in other federal judicial circuits because those other decisions (discussed at page 22 of the petition) involved the use at trial of evidence secured by the Government in violation of the Internal Revenue Service's published regulations, rather than, as here, the grand jury's power to indict in the face of a violation of Internal Revenue Service's published regu-

lations. However, it is respectfully submitted that this attempted distinction does not resolve the conflict. The issue involved in *United States* v. *Heffner,* 420 F.2d 809 (4th Cir. 1969) and *United States* v. *Leahey,* 434 F.2d 7 (1st Cir. 1971) is the same as that of the instant case: May the Internal Revenue Service violate the law as defined in its own published regulations, or should the Court impose sanctions to enforce compliance. In *Heffner* and *Leahey* the Courts did impose an appropriate sanction, the suppression of evidence; in the instant case, the violation resulted not merely in unlawfully obtained evidence but in an unlawfully obtained indictment, and no sanction is available to the Court or to the defendant except dismissal of the indictment. To permit the indictment to stand would leave the Internal Revenue Service with unfettered discretion to violate its own regulations, and therefore to violate the law with impunity, in total disregard of a taxpayer's legally defined rights.

CONCLUSION

For the above reasons, and for the reasons set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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